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86 Ill App 2d 69
(1st Dist., Fin. dec.
Sept 21, 1967)

51036

PETER S. SARELAS,

Plaintiff-Appellant,

v.

THEMIS ANAGNOST,

Defendant-Appellee.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff has filed several notices of appeal from the various orders entered in the course of this litigation, and they are consolidated for purposes of decision. Plaintiff's complaint is based on the charge that the defendant had called him a liar during the course of a hearing in open court. Defendant moved to dismiss pursuant to Section 48 of the Civil Practice Act on the ground that the matter in question was privileged. The court sustained the motion. Defendant then moved for the assessment of costs and attorney's fees pursuant to Section 41 of the Civil Practice Act.[1] After a hearing on that issue, the court awarded defendant $1240. Plaintiff's principal contentions on appeal are that it was error to dismiss his complaint, and that the award of costs and fees under Section 41 was unconstitutional. Plaintiff then appealed to the Supreme Court of

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1. Ill. Rev. Stat., ch. 110, § 41 (1965).

"UNTRUE STATEMENTS. Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial."

Illinois, which transferred the cause to this court.

The lawsuit arises from an incident which occurred on July 16, 1962, on the hearing of a case in the Federal District Court for the Northern District of Illinois. At that time the present plaintiff was involved in litigation with numerous parties, including the present defendant. It appears that a number of the defendants in that case had obtained continuances at an earlier date, but that the defendant Anagnost had not been present. At the hearing on July 16, 1962, plaintiff Sarelas stated to the court that the defendant and his wife had been among those who had previously obtained continuances, and Anagnost replied, "This is a lie." It is this remark which is the basis for plaintiff's action for slander.

In Sarelas v. Makin, 32 Ill. App. 2d 339, 177 N.E.2d 867, the court reviewed the law of libel and slander as it related to statements made in the course of a judicial proceeding and concluded that an absolute privilege existed where the alleged defamation was pertinent to the matter in controversy. In the instant case defendant's statement "This is a lie," was made in the context of a dispute concerning events which occurred in the course of a hearing in a law suit. As such, it was pertinent and hence within the privilege hereinbefore noted.

Plaintiff's claim that the proceeding pursuant to Section 41 was unconstitutional is based upon the language of the statute which provides that reasonable costs and fees are to be taxed by the court "at trial." Plaintiff contends that where a complaint is dismissed upon a motion under Section 48, there has in fact

been no trial which the statute requires. In Elston-Damen Currency Exchange, Inc. v. Sheon, 46 Ill. App. 2d 218, 197 N.E.2d 143, the court held that costs and attorney's fees might be assessed against the plaintiff despite the dismissal of his complaint on the ground of res judicata. The court cited Ready v. Ready, 33 Ill. App. 2d 145, 178 N.E.2d 650, for the proposition that the statute is remedial in effect and should be applied where it is clear that the alleged cause of action is within its terms. The statute specifically provides however that such fees and expenses shall be assessed when allegations and denials, made without reasonable cause and not in good faith, are found to be untrue. The defendant contended that the remark attributed to him, "This is a lie," was made in the course of a judicial proceeding and in response to a statement made by the plaintiff. Hence it was privileged. The court had no occasion to find that any material averment was untrue. The issue appears to have been one of law.

The judgment of the court insofar as it dismisses the complaint is affirmed. Insofar as it assesses reasonable expenses pursuant to Section 41 of the Civil Practice Act, it is reversed.

Judgment affirmed in part and reversed in part.

Sullivan, P.J., and Dempsey, J., concur.

50769

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT,
EMILIO GARCIA, Defendant-Appellant.	)	COOK COUNTY, CRIMINAL DIVISION.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In a bench trial, defendant was found guilty of rape and indecent liberties with a child. He was sentenced to a term of 10 to 40 years for the offense of rape and a concurrent term of 5 to 20 years for the offense of indecent liberties.

On appeal defendant contends (1) that he was not proved guilty beyond a reasonable doubt; (2) that he cannot be convicted of both foreceful rape and indecent liberties with a child, because the latter is the lesser included offense of the former, and the finding is contradictory; and (3) the sentence of the court is excessive and shocking and should be reduced.

On February 7, 1965, Linda Fay Byrd, a 12-year-old girl, lived at 2051 West 17th Street, Chicago, with her mother and her four younger brothers and sisters. At about 11:30 P.M., her mother left the apartment, and twenty minutes later defendant, known to Linda as "Able," appeared at the door, asked for her mother and then left. About fifteen minutes later, he returned and asked to use the washroom. While he was in the washroom, Linda got up in the top bunk with a brother and a sister, who were sleeping. When defendant came out of the washroom, he told Linda he was to wait for her mother. Later Linda got down from the top bunk to open the door, and defendant grabbed her by the neck and tried to kiss her.

Linda testified, "When he grabbed me by the neck, he used both hands like this. He kissed me at that time. Then he took me in the kitchen and told me to take off my clothes. I

had long pants on and a blouse. I took off my clothes while Emilio Garcia was holding my neck. I don't recall him saying anything that I can recall now. Then he told me to go in my mother's bedroom and lay down on the bed. Then he unzippered his zipper and got on top of me. * * * At that time he entered my body. * * * Then the phone rang, and my mother called up. The phone is on a little table next to the bed. The phone rang while this was going on. When the phone rang, Able picked it up and gave it to me. He just put his hand over the receiver and I told him it was my mother, and she asked me if everything was okay, and he told me to say yes. I told my mother that everything was okay. There was no further conversation at this time. * * * Then my mother said on the phone that she was coming home soon. I told him that and he got up, and he zippered up his zipper. He then went out the front door where he bumped into my mother. I saw my mother when she came in the front door. I don't remember what I said to her. * * * I had met Emilio Garcia prior to the night of February 7th. I met him twice. Once he took my mother and Theresa shopping. * * * Her last name is Reyna. While this was going on in the apartment between me and the defendant Garcia, the kitchen light was on, and the street light was on."

Linda's mother, Agnes Marie Rodakis, testified, "On February 7, 1965, I had occasion to leave my home. My children were home when I left. The little ones were all asleep except Linda was the only one awake. She was watching TV when I left. I left between 11:00 and 11:30. After I left, I called Linda three times. I came home about, between 1:00 and 1:15. When I came back to the apartment, * * * I saw Able at the entrance of my apartment. * * * The defendant's full name is Emilio Garcia. Prior to February 8, I had been acquainted with the defendant. * * * I had never gone out with him socially. I knew the defendant from the Los Angeles Lounge where I waited on tables during

the holidays. * * * On the morning of February 8, * * * when I met him, I was going in the yard; he ran out of my house and up the stairs just as I got to the one or two stairs going down, he grabbed for my arm and I shoved him. There was no conversation then. * * * When I entered the apartment, I saw my daughter, Linda. She was standing by the side of the bed in my room. She didn't have anything on. She was crying, she was hysterical. She said that he forced her and then he entered her. She was crying pretty bad. Her throat was all bruised. * * * I called the police. After the police arrived, I had occasion later to go to the hospital with my daughter and she was examined by doctors."

On cross-examination, she said that she had called her daughter three times, because she didn't have a key to the house, and "I didn't want her to fall asleep until I came in because she sleeps real sound. * * * The defendant ran right by me and grabbed for my arm as he went by, and I shoved him into the banister."

It was stipulated that Linda Byrd was examined by two licensed medical practitioners who, if called, would testify that they found abrasions in the neck, a fresh laceration of the hymen and sperm.

Defendant testified that he was at the Los Angeles Lounge at 18th and Ashland from around five o'clock in the afternoon until about 11:15 that evening, when he left and went to Lucy's Lounge. Defendant denied having sexual intercourse with Linda Byrd, nor did he see Linda Byrd or her mother on the evening in question, and he was not in their vicinity.

A State rebuttal witness, Theresa Reyna, who lived at 2011 West 17th Street, testified she knew defendant, and that at about 12:00 midnight on February 7, "he was at my door and I had a conversation with him. * * * he asked me if my girl friend Agnes was there. That is the same Agnes Rodakis who is present in court, the mother of Linda Byrd. The conversation

between the defendant and I was just a few minutes."

The record further shows that defendant was convicted of assault with intent to commit rape while in the military service and received a two year sentence.

Defendant contends that he was not proved guilty beyond a reasonable doubt and argues that "none of the children were in court to corroborate the complaining witness' testimony, not even the brother who had supposedly admitted the defendant to the house. Further, according to the mother's testimony, all of her children, save the complaining witness, were asleep when she arrived home. If what occurred in the apartment were true, according to the testimony of the prosecutrix, would not the children have been awakened?"

Defendant further argues that the evidence is improbable, and that "where a conviction must rely primarily on the testimony of a child and is entirely denied by the defendant, it must be so clear and convincing as to remove even a shadow of a doubt. To be satisfactory, this testimony must be consistent with surrounding facts and circumstances. Where such evidence is not clear and convincing, this Honorable Court must reverse the causes." Authorities cited include People v. Ulrich, 30 Ill.2d 94, 195 N.E.2d 180 (1964), where it is said (p. 98):

> "It is true that where conviction of the crime of indecent liberties is based upon the testimony of a child, the evidence must be corroborated or must be otherwise clear and convincing."

From the record, it appears that Linda's testimony was clear and unshaken through an extended cross-examination. The mother saw the defendant as he was leaving the premises, and Theresa Reyna saw him in the vicinity about the time of the occurrence. The identification of defendant was positive, because all three knew him.

Defendant's alibi and the alleged discrepancies in the testimony of the State's witnesses were matters for the trial court to consider in the weighing of the evidence. Where a case

is tried without a jury, the determination of the credibility of the witnesses and the weight to be given their testimony is for the trial judge, and a reviewing court will not disturb the findings of the trial judge unless the evidence is so improbable or unsatisfactory as to justify the reviewing court to entertain reasonable doubt of defendant's guilt. (People v. Hill, 61 Ill. App.2d 16, 208 N.E.2d 874 (1965).) As we cannot say the record in this case raises any such doubt, this court will not substitute its judgment for that of the trial judge, who heard the facts and saw the witnesses.

Considered next is defendant's contention that he could not be convicted of both forceful rape and indecent liberties with a child, because the latter is the lesser included offense of the former, and the findings were contradictory. The State concedes that only one punishment should have been imposed but argues that defendant was properly found guilty of both offenses. We believe the situation presented here comes within the guidelines set forth in People v. Duszkewycz, 27 Ill.2d 257, 189 N.E.2d 299 (1963), where the court said (p. 261):

> "In the present case we are of the opinion that only one sentence should have been imposed, and that sentence should have been for the greater offense."

It is clear that rape is the more serious of the two offenses involved in this case, and it follows that the judgment and sentence imposed on the charge of indecent liberties must be set aside.

Defendant further argues that the rape sentence was harsh and oppressive, and this court should exercise its authority and reduce both the minimum and maximum sentence. The State points out that the rape sentence was within the statutory range and argues that "the evidence showed a brutal rape of a 12-year-old girl, who was choked so severely that abrasions were clearly visible on her neck some hours later. The evidence received in the mitigation and aggravation proceeding also showed that this

was the second similar offense for the defendant, since he had been previously convicted of assault with intent to rape."

We conclude that this is not a proper case for the use of the power to reduce sentences. Therefore, the judgment of the Circuit Court of Cook County upon the offense of rape is affirmed, and its judgment upon the charge of indecent liberties is reversed.

AFFIRMED IN PART AND REVERSED IN PART.

BURMAN and ADESKO, JJ., concur.

Abstract only.

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86 I.A.2 81

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50993

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANDREW LACY, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY, CRIMINAL DIVISION.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In a bench trial, defendant was found guilty of robbery, and he was sentenced to the penitentiary for a term of 5 to 15 years. On appeal he contends that he was not proved guilty beyond a reasonable doubt.

On May 16, 1965, at about 1:30 A.M., Harry Taylor, a taxicab driver, was robbed of $21 by a passenger. Taylor identified defendant as the one who held a gun at his [Taylor's] head and said, "Give me your money," and "I handed him 21 singles." The other passenger, Percy Jones, had just cleared the door, getting out.

Taylor testified that he, too, had a gun, and when the two passengers left his cab he jumped out and fired a shot over defendant's head, and defendant ran into a driveway. Taylor also fired a shot at Jones, who stopped running, and Taylor brought him back to the cab. He further testified, "I saw Andrew Lacy [defendant] later that morning. I saw him three times before the police arrived. This was about 25 after 1:00 that the hold-up took place. * * * First he came back to the corner of 66th and Yale and peeped around the corner. I saw him then. Then he went west on 66th Street, back around where he had been originally * * *. He was moving behind the buildings. * * * I was still at my taxicab with Jones. He crossed over to the east of Yale down behind the buildings and came down east in the driveway, directly east of us. When he got directly east of us he yelled to Percy to move over so he could get a shot at me. Percy told him, 'We are already in a lot of trouble.' * * * I next saw Andrew Lacy at the police

show-up. * * * I got there about 8:40 p.m. This was the next day. * * * When I saw the defendant in the lineup, I just pointed him out. * * * I saw People's Exhibit No. 1, a gun, on the night of the robbery. The gun was in Andrew Lacy's hand the first time I saw it."

On cross-examination, Taylor testified that he had been employed by the Checker Taxi Company since 1960 and had been carrying a gun without a license. Before the robbery he had been carrying the gun between his legs to protect his life. He talked to two police officers, and "I did not say Jones and another man attempted to rob me. I did not tell them about seeing Lacy three times after I captured Jones." Taylor further said that he had been charged with firing a gun within the city limits, and the charges were dropped.

Percy Jones, a witness for the State, testified that at defendant's invitation, he entered the cab and defendant gave directions where to go, and when the cab stopped, "I heard Andrew ask the cab driver how much. So the cab driver told him how much. So about that time he said, Andrew said, 'Open the door.' He was talking to me. So I started to open the door and he said, 'Open the door and get out.' And when I looked around, well, then at that time I see the pistol. Andrew had the pistol in his right hand. * * * I don't know how the money came in but all I seen was Andrew had some money in his hand. I saw the money when I was getting out of the cab and I looked back, over my shoulder. * * * When I looked back, well, I seen some money in Andrew's hand. He was still in the cab. I saw the gun at that time when I saw the money. The gun was in Andrew's hand. * * * I had not seen a gun in the hands of the cab driver. After we left the cab, * * * he was on the running-board of the cab and he said, 'Halt.' He said, 'Halt, or I'll kill both of you.' So about that time the cab driver made a shot. So I took off, I went to running, so I run a piece, and he said, he told me, 'Halt, stop or I'll kill you.' So I just stopped." He further

testified that "People's Exhibit 1" looked like the gun "I seen in Andrew's hand."

On cross-examination, he stated that he told the police that he knew nothing about a robbery, and denied that he previously testified that he didn't see any gun in the hand of defendant until he was outside of the cab.

Another witness for the State, a police officer, testified as to the arrest of defendant, and that on searching him they found an automatic pistol and ~~sixteen~~ 16 one dollar bills.

Defendant testified that he had been convicted of robbery before and was sentenced to the penitentiary. He knew Jones and invited him to accompany him on a visit to his girl friend. Jones had a gun, and "he told me he had tight pants on and asked me would I carry it, so I told him I would." When the cab driver stopped, "I asked Percy Jones to get out of the cab * * *. Then when I went to pay him, he came up with a .38, I presume it was, it was shiny looking, and I slammed the door in his face and started running and told Percy Jones he had a gun. Percy Jones started running, and the cab driver said, 'I'll kill both of you.'" He denied robbing the cab driver and said, "I did not put the gun to the face or head of the cab driver."

Defendant argues that the cab driver's story was unbelievable, and the testimony of the cab driver on cross-examination was consistent with the testimony of defendant and made it clear that defendant was not guilty of any crime, and "since the cabdriver admitted that he pulled his gun before he saw any gun in the defendant's hand, and before the defendant said anything to him, it is beyond credulity to believe that at that point the defendant could have or would have robbed him of $21.00." Defendant further argues that the testimony of Jones corroborated the defendant in all details, and the cab driver invented the robbery to justify his action of firing a gun within the city limits, and that "the totality of the circumstances here leaves a reasonable doubt as to the defendant's guilt." People v. Reese, 34 Ill.2d 77, 213 N.E.2d 526 (1966).

The State contends, "The question in this case is one of credibility of the two state witnesses, the victim who, acting in the normal course of his business, and Jones who was not shown to be a participant, neither of whom were impeached versus one witness for the defense who was the defendant and who was impeached by the State as evidenced by a stipulation to the effect that the defendant was convicted of four previous convictions for robbery."

This record calls for the application of the rule that where a case is tried without a jury, the determination of the credibility of the witnesses and the weight to be given their testimony is for the trial judge, and a reviewing court will not disturb the finding of the trial judge unless the evidence is so improbable or unsatisfactory as to justify the reviewing court to entertain reasonable doubt as to the defendant's guilt. People v. Hill, 61 Ill. App.2d 16, 208 N.E.2d 874 (1965).

As we cannot say that the record in this case raises any such doubt, we find no reason to disturb the judgment of the trial court, and therefore the judgment is affirmed.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

Abstract only.

86 I.A.2 89

M-51575

NICHOLAS J. KOUTSELAS, Plaintiff-Appellee, v. CERTIFIED CHEMICALS, INC., an Illinois corporation, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a summary judgment entered against it on the pleadings and exhibits. Defendant sought to hold a $2,000 security deposit for a proposed lease as damages for plaintiff's refusal to execute the lease. Defendant contends that the record presents a triable issue.

The complaint alleges that prior to August 5, 1965, plaintiff and defendant were negotiating for the rental of a store by plaintiff; that on August 5, 1965, plaintiff deposited $2,000 with defendant to be used as a security deposit for a 5-year lease on the premises; that subsequent to August 5, 1965, several drafts of a lease were submitted to plaintiff, but no lease was executed and defendant refused to return the $2,000. The complaint includes as an exhibit a receipt signed by the president of defendant, which states: "Received today, August 5, 1965, of Mr. Nicholas J. Koutselas, $2,000.00 security deposit for lease at 901 West North Avenue Corner, subject to lease agreement."

Defendant's answer alleges that there was a valid and binding agreement between the plaintiff and defendant on August 5, 1965, to enter into a lease, and that in consequence thereof defendant did not enter into a lease with other prospective lessors, keeping the premises vacant and available for plaintiff's occupancy. Defendant's answer has attached as an exhibit a lease allegedly agreed upon by plaintiff and defendant, but which was not signed by plaintiff. Defendant's answer further states that plaintiff "refuses and persists in refusing to execute the aforesaid lease."

After defendant answered, plaintiff moved for judgment on the pleadings. Defendant replied and asserted that an oral agreement for a lease had been entered into and partially performed because (1) defendant on August 5, 1965, signed and delivered to plaintiff a written memorandum setting forth the terms of the lease in detail; (2) plaintiff "paid defendant security deposit in the amount of $2,000.00" in compliance with the memorandum; and (3) defendant "in acknowledging plaintiff's partial performance of the agreement between the parties executed and signed a written receipt, (plaintiff's Exhibit 1) attesting to the fact that plaintiff had deposited with defendant the aforesaid $2,000.00 sum referred to in the August 5, 1965 memorandum executed by the defendant and delivered to plaintiff."

A discussion of the contentions of both sides and the supporting authorities is unnecessary. The unexecuted lease, included in defendant's answer as an exhibit, is dated August 9, 1965, and for a period commencing November 1, 1965, and a rider shows that "the lessee agrees to deposit with the lessor, a total sum of Two Thousand ($2,000.00) Dollars, as and for a security and guarantee deposit for the performance of the covenants of this lease, * * *." There is nothing in either the receipt or the memorandum of August 5, 1965, to indicate that the $2,000 was for any other purpose except to be a security deposit for a lease that was never executed. Therefore, it was proper for the trial court to enter a summary judgment for plaintiff, which is affirmed.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

Abstract only.

86 I.A.2 250

No. 67-19

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1967.

Abstract

PEOPLE OF THE CITY OF KEWANEE, Plaintiff-Appellee,	)	Appeal from the 14th Judicial Circuit, Henry County, Illinois.
vs.	)	
PETE FISCHER, Defendant-Appellant.	)	Honorable Francis Dean, Presiding Magistrate.

ALLOY, J.

As a result of a bench trial before a non-lawyer magistrate, defendant Pete Fischer was found guilty of a charge of keeping a howling dog in violation of an ordinance of the City of Kewanee. The ordinance provides that any person who would keep a dog, etc. shut up or tied in any yard, etc., which by barking, howling or other noises shall disturb the peace and quiet of any family, etc., may be fined upon conviction, not more than fifty ($50) dollars for each such offense. A fine of $50 and costs of $20 were assessed against defendant, but the magistrate withheld the imposition of the fine provided defendant kept his dog in a doghouse, which would presumably prevent him from howling. The magistrate also suggested to the complaining witness that he retire earlier so as not to be disturbed as much by the barking of the dog. The latter portions of the order were designed as a rather Solomonic arrangement which was calculated to create peace and harmony between the neighbors.

On appeal in this Court, defendant (among many contentions) asserts that no evidence was introduced to support the charge in the complaint, and that the judgment was against the manifest weight of the evidence. A request is also made in this Court for the allowance of attorney's fees and costs under Section 41 of the Civil Practice Act (1965 Illinois Revised Statutes, Chapter 110 §41), on the theory that the prosecution was undertaken without reasonable cause and not in good faith.

The evidence in the case offered by both the complaining witness, Elmer Van Dyke and his wife, indicated that the defendant's dog howled and barked so as to disturb them. The defendant introduced the testimony of seven witnesses most of whom lived nearer to the location of the defendant's dog than did the complaining witness. These witnesses testified that they were not disturbed by defendant's dog. The evidence strongly indicated that defendant's dog was rarely heard to bark or make any noise.

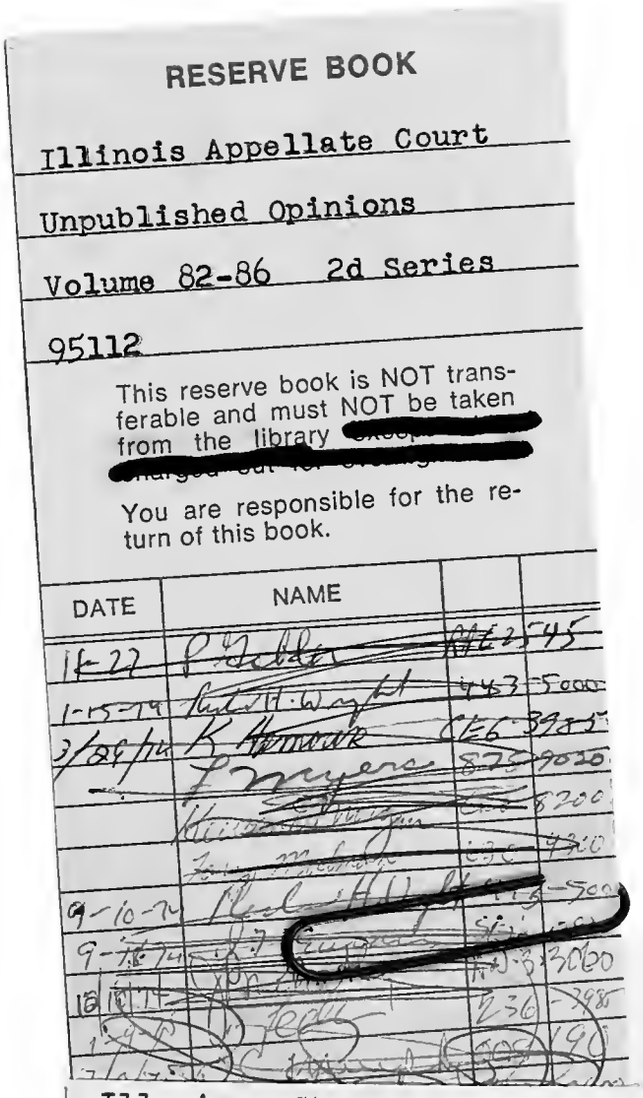
[1] While we are reluctant to disturb the conclusion of the magistrate, on the record before us it appears that the judgment was against the manifest weight of the evidence and that there should not have been a conviction in this case on the evidence presented in the trial court (AMERICAN STEEL & WIRE CO. v. MOSELE, 129 Ill. App. 8). In the case last cited, the court had concluded that where two witnesses testify to a state of facts in which they are contradicted by seven witnesses who testify to a much more reasonable and probable condition, the verdict based on the testimony of the two witnesses should not be sustained.

[2] We find no basis, however, for the invocation of Section 41 of the Civil Practice Act referred to. No request was made for the assessment of attorney's fees under said section nor would the record justify the assessment of such fees. The Act is designed to prevent harassment through the bringing of vexatious actions which are known to have no legal or factual foundation. It is obvious from the record before us that the plaintiff and the complaining witness proceeded

reasonably on the basis of probable cause. The fact that the record did not justify a conviction does not, however, subject the People or the complaining witness to any penalties provided for in Section 41 of the Civil Practice Act. The judgment of the Circuit Court of Henry County will, therefore, be reversed.

Judgment reversed.

Stouder, P. J. and Coryn, J. concur.



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